IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 230 of 2007

LRS.OF KANHAIYA LAL
V/S
GOPAL LAL

Mr. OP MEHTA, for the appellant / petitioner

Mr. RAKESH ARORA, for the respondent

Date of Order : 9.10.2007

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

The defendant appellant seeks to challenge the judgments & decrees of the two learned courts below, decreeing the plaintiff's suit for redemption.

The property was mortgaged by Kajorimal Khatri to the appellants' ancestor (original defendant) on 12.4.1972, for a sum of Rs. 6000/-, by registered mortgage deed, which was registered on 13.4.72. According to the plaintiff the mortgagor executed a Will in favour of the plaintiff on 7.4.69, and the mortgagor died on 9.10.1972, since then the plaintiff is looking after the other properties of the testator, on the basis of the Will. The mortgage was effected for a period of five years, which is already over, and thereafter demand for redemption was made, then a

notice was given on 10.8.94, which too was not replied. It is also alleged that the defendant has removed the valuable shutters of the property, and installed an iron shutter, for which a first report has been lodged. Interalia with these averments decree for redemption was claimed.

The defendant contested the suit by filing written statement, pleading interalia that the testator did not execute any Will, and the plaintiff is not entitled to maintain the suit. The factum of mortgage was not disputed. However, it was pleaded that the plaintiff never approached the defendant for redemption, nor ever mentioned about the Will, nor any notice was given. The Will was pleaded to be forged document. It was also pleaded that the defendant has undertaken repairs of the property, wherein he had spent Rs. 50,000/-, which was spent with the consent of the mortgagor, and is entitled to recover this amount as well. It was pleaded that the plaintiff should have paid the court fees, by adding this amount in the valuation of the suit. Then, it was also pleaded that till the plaintiff obtains probate of the Will, or otherwise gets himself declared owner of the property he cannot maintain the suit. The learned trial court deciding issue no.1 found, that P.W.1, 2 and 4 have proved the Will, and that another suit was filed by the plaintiff against Harbansdas, for eviction of the property of the testator, which was decreed vide decree Ex.9, and therein the statements of the attesting

witnesses Motilal and Nanalal were recorded, and certified copies thereof have been produced as Ex. 12 and 13, and that, these two witnesses have died. The said two witnesses had clearly proved the Will in accordance with law. It was considered, that after devolution of the property on the plaintiff, he got sent notice Ex. 4, postal receipts thereof is Ex.5 of Feb., 1973, on the registered address of the defendant, and therefore, it was considered that there is presumption arising about notice having been received, has not sufficiently been rebutted. It was found that the defendant has not deposed to have not received the notice. Thus, the issue no.1 relating to the Will was decided in favour of the plaintiff, and it was found, that in Rajasthan it is not necessary to obtain the probate. Then, regarding issue no.2, about alterations having been done by the defendant, it was found, that the plaintiff has failed to prove this issue. Then, issue no. 3 regarding mortgage was found in favour of the plaintiff. Then, in issue no. 4 relating to the expenditure incurred by the defendant, and suit being not maintainable on that count, it was found, that Prem prakash has been examined as D.W. 1 on the side of the defendant, who has not deposed about any such thing, therefore, the issue has been decided against the defendant, and ultimately decree for redemption was passed. The same has been upheld in appeal.

Assailing the impugned judgments and decrees, much

was contended to the effect, that the Will has not been proved in accordance with law, the Will is a suspicious document, and is a forged, and manipulated document. Various circumstances in this regard were attempted to be submitted, including that the suit has been filed after 22 years of the mortgage, there being no recital in the mortgage about any Will having been executed by the mortgagor, and the signatures on the Will being not tallying with the mortgage deed, and so on and so forth. It was submitted that the suspicious circumstances have not been dispelled. Then, it is also contended that Ex. 12 and 13 could not have been relied upon, or even considered in the present suit, as other litigation was a collusive litigation, where compromise decree was obtained, and in that suit these witnesses have not even been cross examined, and that, the present litigation has been instituted after waiting for the death of both the attesting witnesses, apart from the fact, that in any case, the scribe could and should have been produced in evidence by the plaintiff. Thus, it was pleaded that in absence of proof of the Will, the learned courts below were in error in decreeing the suit.

I have considered the submissions, and have heard learned counsel for either side.

In my view, the contentions raised by the learned

counsel for the appellant do not have any merit. The learned counsel for the respondent informed the date of the institution of the earlier suit, and its disposal, which showed that the matter was litigated much longer than even a decade. Simply because after a full dressed contest, litigation ultimately results into compromise, it cannot be said, that that litigation is collusive. Secondly this has never been the stand of the appellant in the courts below, about that litigation being collusive. Then, so far as the statements Ex. 12 and 13 are concerned, the learned counsel for the respondent made available for my perusal certified copies thereof, and I find, that one of the witnesses have been cross-examined, on the aspect of the attestation of the Will. After reading of the two statements, there is no manner of doubt, that those witnesses did depose to prove the Will, in accordance with requirements of the Succession Act, about execution, and its proper attestation. So far the permissibility to consider these two statements Ex. 12 and 13 is concerned, admittedly when both the witnesses are dead, and those two statements were recorded at the time, when the present controversy did not arise, and were recorded in ordinary course of things, in view of the provisions of Section 32 of the Evidence Act, those statements can very well be considered. What is significant to note is, that as against that, the defendant has not led any evidence to dispute the Will, even by a bare word of mouth. The defendant himself has not appeared in the

witness box. In such circumstances, there was no justification for not accepting the evidence led on the side of the plaintiff.

It was argued before the learned lower Appellate Court, that a comparison of the signatures on the Will and the mortgage deed, if made under Section 73 of the Evidence Act by the Court, it would be clear that the signatures are suspicious, and are not similar, but this contention was negatived by the learned lower Appellate Court, by observing, that the original mortgage deed is with the defendant himself, who has not produced it, and that the defendant could have very well produced the same to show this fact, and substantiate the contention. In the present case, certified copies of the mortgage deed has been produced, having been obtained from the Sub Registrar, and has been proved as Ex.3. To counter this observation, learned counsel for the appellant has produced the original mortgage deed, and one rent note, before this Court, along with an application under Order 41 Rule 27 C.P.C. It is too much for the Second Appellate Court to take the documents on record, for the purpose of re-appreciating the evidence, as appreciated by the two learned courts below, to arrive at an independent finding, on the question of fact, as to whether the signatures of the testator, as appearing on the mortgage deed, and the Will, are similar, and not, and therefore, I am not inclined to accept the application

under Order 41 Rule 27 C.P.C.

Then, coming to the argument of suspicious circumstances, the Will being suspicious, the suit having been filed much belatedly, Will mentioning a fact about testator being not on good terms with the other persons, and therefore making Will in favour of the plaintiff, and so on, it would suffice to observe, that the considerations taken into account about dispelling the suspicious circumstances, in the matter of Will, have been invoked in all cases where the litigation is between heirs, and/or where the legatee wants to adversely affect the inheritance, or the right of other heirs, or natural heir. In the present case that is not the situation. The appellant is a mortgagee plain and simple, and significantly, this is not the averment of the appellant, that apart from the plaintiff there are any other heirs, who are sought to be excluded by the plaintiff, to grab the property. It has come on record, that the mortgagor was issue less. In such circumstances, if he has made the Will in favour of the plaintiff, the mortgagee cannot be conceded right, albeit an indefeasible right, to call upon the plaintiff, who steps in the shoes of the mortgagor, to prove the Will, by dispelling all suspicious circumstances, including the suspicious circumstance, which ordinarily are not even required to be pleaded, and are to be looked by the Court itself. The redemption in the present case will

give valid discharge to the defendant.

Thus, considering the case from any stand point, I do not find the appeal to be involving any substantial question of law, for the purpose of entitling the appellant to retain the mortgaged property. The appeal thus has no force, and the same is dismissed summarily.

(N P GUPTA),J.

/Sushil/